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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 558

MAGNOLIA PETROLEUM COMPANY, THE OHIO OIL COMPANY, THE SUPERIOR OIL COMPANY AND WESLEY WEST, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

Order No. 174–A of the Federal Power Commission (Pet. App. 79–96) is reported at 19 Fed Reg. 5081. The opinion of the Court of Appeals (Pet. App. 1–50) is reported at 236 F. 2d 785.

JURISDICTION

The judgments of the Court of Appeals were entered on June 30, 1956 (Pet. App. 51–52). Petitions for rehearing, timely filed, were denied on August 21, 1956 (Pet. App. 246–250, 253–256, 260–267, 53–54). The petition for a writ of certiorari

was filed on November 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether a Court of Appeals has jurisdiction, under Section 19 (b) of the Natural Gas Act, to review a general order of the Federal Power Commission providing a simplified procedure whereby those independent producers subject to regulation under the Act by virtue of this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, may come into compliance with the Act.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission Regulations are set forth in the Appendix to the petition at pages 131–140, 59–127.

STATEMENT

By petitions filed in the United States Court of Appeals for the Fifth Circuit, petitioners, independent producers of natural gas, sought review of an order of the Federal Power Commission (Order No. 174–A) establishing a procdure for effectuating this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. The Court of Appeals dismissed the petitions, holding that the Commission order was not reviewable under Section 19 (b) of the Natural Gas Act. The relevant facts may be summarized as follows:

On June 7, 1954, this Court held in the *Phillips* case that independent producers of natural gas were subject to regulation under the Natural Gas Act to the extent that they engaged in "wholesales of natural gas in interstate commerce" (347 U. S. at 682). Prior to that time, the Federal Power Commission had directed its regulation under the Act to companies engaged primarily in interstate pipeline operations, and activities incident thereto; the rules and orders issued by the Commission had been mainly designed to implement regulation of such interstate pipeline companies (F. P. C. Order No. 144, 13 F. R. 6371). However, these rules and orders were directed to "natural-gas companies," and so in terms included the independent producers which were held by the *Phillips* decision to be "natural-gas companies." Not wishing to subject these independent producers to the more onerous requirements of the rules and regulations applicable to pipeline companies, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by this Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A, which superseded Order No. 174 but made no substantial change in the provisions here involved (19 F. R. 5081).[1]

[1] The orders were issued without notice or hearing because the Commission found, in accordance with Section 4 (a) of the

Order No. 174–A adopted substantially the language of the *Phillips* decision in defining the class of independent producers of natural gas subject to the Act as including those natural gas companies "engaged in the production or gathering of natural gas and who transport[s] natural gas in interstate commerce or sell[s] natural gas in interstate commerce for resale * * *" (347 U. S. at 683, 684; Pet. App. 80). The order did not purport to determine which of the over 4,000 independent producers were subject to regulation under the Act but left such determinations, which frequently involve complex factual questions, to individual hearings.[2] The order required producers subject to the

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Administrative Procedure Act, 5 U. S. C. 1003 (a), that "good cause exists for making the rules and regulations herein adopted effective on less than thirty days' notice" in order to minimize the uncertainty and confusion which would result from delay in carrying out this Court's mandate in the *Phillips* proceeding (Pet. App. 60).

[2] In issuing Order No. 174, the Commission had stated (Pet. App. 60–61):

> Although the decision of the Supreme Court is, of itself, notice to all "independent producers," as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.
>
> Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth.

Act to file with the Commission, by October 1, 1954, schedules for existing rates in effect on June 7, 1954, the date of the *Phillips* decision, and applications for certificates of convenience and necessity for existing service (Pet. App. 80). When a large number of natural gas producers, including petitioners, filed motions for rehearing and a stay of Order No. 174–A, the Commission denied all the requests for stays but called for briefs and suggestions as to revision of the order and granted oral argument on the motions (Pet. App. 100). Following submission of briefs and oral argument, the Commission extended the time for compliance with the provisions of Order No. 174–A to December 1, 1954 (Pet. App. 101). On December 17, 1954, the Commission amended and reissued Order No. 174–A as Order No. 174–B, and denied all applications for rehearing.[3]

After the hearings on Order No. 174–A but prior to the issuance of Order No. 174–B, each of the

[3] Only 174–A is involved in this proceeding, although Order No. 174–B in material respects is identical to the prior order (Pet. App. 102–107). In Order No. 174–B the Commission emphasized that the order was procedural and non-substantive in nature and went on to state (Pet. App. 103–104):

> * * * We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practicable time in order to facilitate prompt determination of jurisdictional questions.

present petitioners filed petitions for review in the court below (Pet. App. 199–245).[4] Although the petitions for review raised various procedural objections to the order, their primary claim was that the order was invalid, arbitrary and unconstitutional as applied to petitioners because they are not "natural gas companies" within the definition of the Natural Gas Act (Pet. App. 8, 9). The Court of Appeals, Judge Brown dissenting, after noting that the order did not purport either to apply to the petitioners or to determine which of the many independent producers were subject to regulation, held that the order was only procedural and did not affect any substantive rights and so was not reviewable under Section 19 (b) of the Natural Gas Act or Section 10 of the Administrative Procedure Act.[5] It therefore dismissed the petitions for want of jurisdiction (Pet. App. 1–50).

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[4] In addition, they sought a stay of the Commissioner's order (Pet. App. 158–197); stays were allowed to Magnolia Petroleum Company and Ohio Oil Company (Pet. App. 128).

[5] While the question presented in the petition invokes Section 10 of the Administrative Procedure Act, petitioners do not deal with this issue in their discussion under the heading, "Reasons for Granting the Writ." The brief discussion by the court below is, we believe, dispositive (Pet. App. 14–15):

> * * * the [Administrative Procedure] Act adds nothing to our jurisdiction under the Natural Gas Act. Section 10 of the Administrative Procedure Act provides that its provisions are applicable "except so far as (1) statutes preclude judicial review * * *" and the Supreme Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, characterized Section 19 (b) as one of the statutes precluding judicial review within the meaning of that section.

ARGUMENT

This is the third petition for certiorari filed by independent producers of natural gas seeking review of an order issued by the Federal Power Commission to provide a procedure for effectuating this Court's ruling in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, that sales made by independent gas producers for resale in interstate commerce are subject to the Natural Gas Act. See *Federal Power Commission* v. *Union Producing Co.,* 230 F. 2d 36 (C. A. D. C.), certiorari denied, 351 U. S. 927; *Gulf Oil Corp., et al.* v. *Federal Power Commission,* 230 F. 2d 40 (C. A. D. C.), certiorari denied, 351 U. S. 973; see also *Amerada Petroleum Corp.* v. *Federal Power Commission,* 231 F. 2d 461 (C. A. 10). Each of these petitions proceeds on the premise that the petitioners are not "natural gas companies" subject to the Natural Gas Act, and that the Commission order, which they say purports to give them such a status, is invalid and unconstitutional as applied to their sales and operations (see Pet. App. 8, 9). Each of the three Courts of Appeals which have passed on the question has recognized, however, that the Commission's order merely provides a procedural framework for applying the Natural Gas Act pursuant to the *Phillips* decision, leaving the question of the status of individual companies for subsequent determination. These holdings are clearly correct and there is no conflict of decisions. Accordingly, there is no more occasion for review here than there was in *Union Producing* and *Gulf Oil* in which certiorari was denied last term.

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1. The declared purpose of the Commission's Orders No. 174, 174–A, and 174–B was to provide "reasonably simple rules and regulations" whereby independent producers subject to the Commission's jurisdiction could come into compliance with the Act and thereby be relieved of the accounting, filing, and certification requirements of the Commission's outstanding regulations which, having been designed for pipeline companies, would have been burdensome if applied to producers (Pet. App. 59–61). The requirement of Order 174–A that those rates actually charged by the producers on June 7, 1954 (the date of the *Phillips* decision) be filed as initial rate schedules and that any changes in existing rates be filed with the Commission, pursuant to Section 4 (e) of the Act, were necessary preliminaries to the Commission's assuming jurisdiction over a new segment of the industry. The order was explicit, however, that determinations as to what independent producers were subject to the Act, and hence to the order's requirements, would await hearings in particular cases in view of the obvious impossibility of making such determinations in a general rule-making proceeding (Pet. App. 104). The Commission's order stressed, moreover, that in view of the general uncertainty as to the Act's coverage, wherever possible it would avoid the imposition of penalties for failure to comply with its general orders (*supra,* p. 4; Pet. App. 60–61).

It is thus clear that, on its face and in practical effect, Order No. 174–A was not an order issued "after

a hearing" in a proceeding under the Natural Gas Act of the type this Court held reviewable in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, and that petitioners are not persons aggrieved by the order within the meaning of Section 19 (b). The order was not specifically directed against them (*Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C. A. 10); *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796 (C. A. D. C.), certiorari denied, 340 U. S. 827), and petitioners themselves contend that they are not natural gas companies subject to Commission regulation under the Act. As the court below stated (Pet. App. 11):

> * * * we think it plain that the Commission has simply promulgated regulations of general applicability and not an order reviewable under Section 19 (b). The order does not change the petitioners' existing or future status or condition since it is not an adjudication that any particular natural-gas producer is a "natural-gas company" or an "independent producer." The definition of the latter as set forth in the order merely enunciates a classification of certain types of "natural-gas companies," but such a classification in a general regulation does not subject any person or corporation to the Commission's jurisdiction. If persons whose sales of natural gas are such as to bring them within the Commission's jurisdiction, this circumstance arises by reason of the Natural Gas Act itself and not by virtue of the order in question.

would have been to hold individual hearings with respect to each of innumerable companies to determine upon adduced facts whether they were under its jurisdiction. The impracticability of such a method is obvious.

* * * * *

* * * The fact remains that this case comes to us without a record, without a single established fact or finding, and without evidence, and in that posture we as an appellate court are asked to exercise our appellate powers of review. In fact, we are asked to determine that petitioners are not subject to the jurisdiction of the Commission without a single fact upon which to base such determination and in the absence of any findings of fact by the Commission.

2. The very same considerations apply here. If petitioners are not subject to Commission regulation, Orders No. 174, 174–A, and 174–B do not apply to them and they are not required to comply with these orders.[6] Moreover, they have not availed themselves

[6] While the court below, in view of its disposition of the cases, did not reach the merits of the alleged illegal invasion of petitioners' substantive rights, it may be noted that two of the petitioners' principal claims relate to the Commission's requirement that independent producers file as their initial rates the rates in effect on June 7, 1954, the date of the *Phillips* decision, and the further provision that rate increases effective after June 7, 1954, even though pursuant to escalation clauses in contracts filed as initial rate schedules, must be filed as rate changes pursuant to Section 4 (d). See Pet. pp. 17–19. These contentions have already been rejected in *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (C. A. 10), certiorari denied November 13, 1956, No. 418, this Term; *Continental Oil Co.* v. *Federal Power Commission*, 236 F. 8d 839 (C. A. 5), pending on petition for certiorari, No. 457, this Term. As demonstrated in our briefs in opposition in Nos. 418 and 457, these provisions were well within the Commission's authority.

of the remedy offered to them for determining whether they are in fact subject to Commission regulation. Order No. 174–B, adopted on December 17, 1954, stated that hearings would be held as soon as practicable to determine the status of the various independent companies, and a number of independent producers have brought proceedings to determine their status under the Act pursuant to Section 1.7 (c) of the Commission's rules, which provides for "a declaratory order to terminate a controversy or remove uncertainty." Petitioners, however, did not seek an authoritative ruling by the Commission as to their status under the Natural Gas Act[7] (although one of the petitioners (Wesley West) applied for a declaratory order in October 1954, but withdrew his application at the hearing before the Commission on November 22, 1954).

Prior holdings of this Court make it clear that petitioners were required to pursue the remedy provided by the Natural Gas Act and the Commission's regulations despite allegations of irreparable injury, and that the Court of Appeals was correct in holding that

[7] It is clear that an order of the Commission determining petitioners' status under the Act would be reviewable by a Court of Appeals pursuant to Section 19 of the Natural Gas Act and by this Court through writ of certiorari. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672. Three such petitions for review of Commission orders in Section 1.7 (c) proceedings, holding independent companies subject to the Act, are now pending before the Fifth Circuit: *Deep South Oil Co.* v. *Federal Power Commission*, No. 15,849; *Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 15,884; *Shell Oil Co.* v. *Federal Power Commission*, No. 15,900. See also *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550 (C. A. 3).

it could not substitute itself for the agency which Congress had established to make the initial determination of petitioners' status under the Act. *Myers* v. *Bethlehem Shipbuilding Co.,* 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752; *Securities & Exchange Commission* v. *Otis & Co.,* 338 U. S. 843; *Lichter* v. *United States,* 334 U. S. 742; *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535.

Every factor which led this Court to require exhaustion of administrative remedies in earlier cases involving allegations of irreparable injury, such as *Myers* v. *Bethlehem Shipbuilding, supra,* is present here, militating against a premature and disruptive assumption of jurisdiction by the Court of Appeals. The problems facing the Commission following the *Phillips* decision were vast in scope and complexity, and the questions involved—including the applicability of the Act to individual companies—were peculiarly within the Commission's competence. A uniform, orderly, and expeditious extension of the Act's coverage was essential to give proper effect to this Court's decision, as well as to avoid injustice and inequity to the companies involved. See *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U. S. 492, 501.

The normal necessity for exhausting the administrative remedy is strengthened in this case by the fact that Congress, in Section 19 of the Natural Gas Act,

provided a special procedure for obtaining review of Commission orders respecting coverage, and "Section 19 (b) reflects the policy that a party must exhaust its administrative remedies before seeking review." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499. See *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C. A. D. C.), certiorari denied, 351 U. S. 927.

3. Petitioners contend (Pet. 8–15) that the decision below conflicts with this Court's decisions in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Frozen Food Express* v. *United States*, 351 U. S. 40, and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192. Similar assertions were made in the petitions in *Union Producing* and *Gulf Oil, supra.*[5]

Columbia Broadcasting (Pet. App. 12), as the court below recognized, did not involve a question of coverage, for the Communications Commission regulations were clearly applicable to all radio station licensees, had an immediate adverse effect on the broadcasting company's contractual relations with its component stations, and were substantially self-executing. Unlike the instant case, therefore, there was no question of status to be resolved by the agency. Here, the Power Commission must decide initially whether petitioners are subject to the Act at all. Moreover, the

[5] The *Union Producing* petition, No. 792, 1955 Term, alleged a conflict with *Columbia Broadcasting*. The *Gulf Oil* petition, No. 888, 1955 Term, in addition asserted a conflict with *Frozen Food Express*.

regulations in the *Columbia Broadcasting* case—unlike the present order—were substantive and not merely procedural in nature, since they outlawed certain provisions in existing contracts between the network and its component stations. There is thus nothing in the *Columbia Broadcasting* ruling contradicting the well-established principle that one who complains of agency action must pursue to its conclusion the administrative remedy provided by Congress before resorting to the courts for a determination of his rights. See *Amerada Petroleum Corp.* v. *Federal Power Commission,* 231 F. 2d 461 (C. A. 10).

The same considerations distinguish *Storer* and *Frozen Food Express. Frozen Food Express* involved a general order of the Interstate Commerce Commission, issued after hearing, finding certain commodities to be non-agricultural, and hence not within the Act's "agricultural" exemption. *Storer* concerned a Federal Communications Commission regulation of general applicability which was promulgated after hearing and by its terms prohibited a broadcaster from acquiring more than a limited number of stations. In neither case was there any doubt that the agency order applied to the parties seeking review. Since this Court regarded agency action as complete in both cases, the issue was whether the petitioners were "aggrieved" parties, entitled to obtain review of an agency order of general applicability. 351 U. S. at 44, 198. The Court, finding that in one case the practical effect of the agency action was to deny the petitioner the right to carry certain commodities, and in the

other to limit the scope of its business, held that the regulation had an immediate substantive impact on the persons seeking review. 351 U. S. at 44, 199, 200. Here, petitioners question that they are subject to the order at all, and the order did not purport to determine petitioners' substantive rights but only to establish procedural requirements under the Natural Gas Act applicable to persons subject to its terms.

CONCLUSION

The decision below is correct and in accord with the decisions of the other Courts of Appeals which have passed on the question. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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